875 15th Street, NW, Suite 750 Washington, DC 20005 telephone 202.789.3120 facsimile 202.789.3112 www.telecomlawpros.com

mlazarus@telecomlawpros.com 202.789.3114

June 22, 2012

BY ELECTRONIC COMMENT FILING SYSTEM

Ms. Marlene H. Dortch Secretary Federal Communications Commission 445 12th Street, SW Washington, D.C. 20554

Re:

Ex Parte Notice – In the Matter of Application of Cellco Partnership d/b/a Verizon Wireless ("Verizon") and SpectrumCo LLC ("SpectrumCo") For Consent To Assign Licenses; Application of Cellco Partnership d/b/a Verizon Wireless and Cox TMI Wireless, LLC ("Cox") For Consent To Assign Licenses, WT Docket No. 12-4

Dear Ms. Dortch:

On June 20, 2012, Steven Berry, Tim Donovan and Rebecca Thompson of RCA-The Competitive Carriers Association ("RCA"), Douglas Minster of Atlantic Tele-Network, Inc. ("ATN"), and Michael Lazarus of Telecommunications Law Professionals PLLC ("TLP"), counsel to RCA and ATN, met separately with Paul Murray, acting Legal Advisor for Wireless Issues to Commissioner Rosenworcel and Louis Peraertz, Legal Advisor for Wireless, International and Public Safety Issues to Commissioner Clyburn regarding the above-referenced proceeding. In addition, on June 22, 2012, Rebecca Thompson and Tim Donovan of RCA, along with Michael Lazarus of TLP, met with Charles Mathias, Special Counsel to Chairman Genachowski, to discuss the Verizon-SpectrumCo/Cox transactions (the "Transactions"). The discussions concerning Transactions were consistent with RCA's and ATN's previous filings and communications in this proceeding, as noted in further detail below.

The Commission Must Not Allow the Unconditioned Assignment of Scarce Spectrum Resources from a Speculator to a Warehouser

RCA discussed its Petition to Condition or Otherwise Deny the Verizon-SpectrumCo/Cox transactions (the "Petition"). RCA urged the Commission to condition any grant of these Transactions on, inter alia, the divestiture of <u>usable</u> spectrum to operating carriers that will put such spectrum to use in the near-term. Specifically, RCA discussed the numerous anticompetitive harms that would result from an unconditioned grant of the Transactions. The Transactions would assign substantial additional nationwide spectrum resources to Verizon Wireless – one of the two largest wireless carriers – which already maintains a significant warehouse of unused spectrum. This further stockpiling of spectrum by Verizon implicates significant spectrum aggregation concerns, particularly in light of Verizon's changing story about what type of, and how much, spectrum it actually needs. Based on the FCC's directive under

the Communications Act of 1934 (the "Act"),¹ it would not be in the public interest for the Commission to allow Verizon to acquire additional spectrum as proposed by the Transactions without the conditions proposed by RCA – as it has not demonstrated that its current spectrum holdings are inadequate.²

As RCA noted in its Petition, the Commission should not proceed with the proposed grant of spectrum from a speculator (SpectrumCo) to a warehouser (Verizon). Verizon's actions clearly have demonstrated that it has been warehousing spectrum. Recently, Verizon has announced that it is willing to sell all of its 700 MHz A and Block spectrum – spectrum which, despite an upcoming June 2013 construction deadline, it has held since 2008 without constructing. However, Verizon's offer comes with a number of conditions: (1) that it will not sell such spectrum until the Commission approves the Transactions and (2) that it will not sell such spectrum for less than what Verizon, in its sole discretion, determines is "fair market value." ³

RCA previously has expressed its significant concerns to the Commission about spectrum aggregation and consolidation, and in particular, Verizon's stockpiling of spectrum for which it has not demonstrated any need. Allowing Verizon such a dominant spectrum position is certainly not in the public interest. As RCA noted in its Petition, the Commission has many tools at its disposal that demonstrate the anticompetitive harm that may flow from such spectrum aggregation, such as (1) undertaking a long overdue revision of the spectrum screen; (2) finding competitive harm on a national basis; or (3) given the current spectrum crunch, determining that it is anticompetitive to allow a spectrum speculator to sell spectrum to a proven spectrum warehouser. Each path leads to one undeniable conclusion: that the Commission must require substantial divestitures of un-or-underused, useable spectrum within an LTE ecosystem from Verizon to competitive, operating entities that will put such additional spectrum to use in the near-term.

<u>The Commission Has the Authority to Order the Divestiture of Either Verizon's Currently-Held</u> <u>Spectrum or of the Spectrum that Verizon Proposes to Acquire</u>

The Commission has the authority to either direct Verizon to select which spectrum it will divest in a given market, or to require the divestiture of specific spectrum in a market. If the Commission chooses to accept Verizon's offer to divest its 700 MHz A and B Block spectrum, the Commission must require such divestitures, along with additional divestitures of advanced wireless services ("AWS") spectrum in various markets, as a condition to any grant. Due to the transaction-specific harms arising from nationwide spectrum aggregation concerns which RCA detailed in its Petition, and based on past Commission precedent, the Commission has broad authority to order spectrum divestitures of any

² RCA Petition to Condition or Otherwise Deny the Verizon-SpectrumCo/Cox Transactions, 19-25 (filed Feb. 21, 2012) ("RCA Petition"); RCA Reply to Opposition to Petition to Condition or Otherwise Deny Transactions, 25-29 (filed Mar. 26, 2012) ("RCA Reply").

¹ 47 U.S.C. § 310(d).

³ Edited Transcript of Q1 2012 Verizon Earnings Conference Call, at 13, (Apr. 19, 2012) available at http://www22.verizon.com/idc/groups/public/documents/adacct/1q12 vz transcript.pdf.

⁴ RCA Petition 40-53.

⁵ Id. at 44-47.

⁶ Section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act. Similarly, Section 214(c) of the Act authorizes the

Verizon-held spectrum post-Transactions. For example, in the AT&T/Cingular transaction, the Commission noted that it is "empowered to impose conditions on the transfer of control of Commission licenses to mitigate the harms the transaction would likely create" and that "such conditions are tailored to address the specific harms anticipated . . . in response to our inquiry, and public comment contained in the record of this proceeding." In this instance, the Commission has the clear authority to order the divestiture of spectrum from Verizon that contributes to the competitive harm caused or exacerbated by the Transactions. Accordingly, the Commission is able to order divestitures from Verizon of any spectrum held by Verizon – not merely the AWS spectrum it is acquiring from SpectrumCo and Cox.

When ordering divestitures, the Commission has regularly ordered acquiring carriers to choose between either divesting the spectrum that they currently hold in a market, or divesting the spectrum that is being acquired. For instance, in the AT&T-Dobson Order, the Commission required that AT&T "divest all licenses . . . of either AT&T or Dobson, in certain markets." Similarly, in the Verizon-RCC Order, the Commission required Verizon to divest "all licenses . . . of either Verizon Wireless or RCC, in certain markets." To be acquired that AT&T or Dobson, in certain markets." To be acquired Verizon to divest "all licenses . . . of either Verizon Wireless or RCC, in certain markets."

Importantly, the Commission also has specifically ordered the divestiture of spectrum types that were not integral to a transaction, as is the case with Verizon's 700 MHz A and B Block spectrum here. In the Verizon-ALLTEL Order, despite the fact that Verizon was acquiring only one AWS license in a minor market,¹¹ the Commission "require[d] the divestiture of all spectrum – including PCS, AWS-1, and cellular spectrum – associated with the Verizon Wireless or ALLTEL business unit being divested, and not just the business unit's cellular spectrum."¹² As a result, even though the Verizon-ALLTEL transaction primarily concerned the transfer of Cellular and PCS spectrum, Verizon was ordered by the Commission to divest AWS spectrum that it held prior to the transaction.¹³ Accordingly, there is ample precedent for the Commission to (i) require Verizon to divest its choice of spectrum in certain markets where competitive harm is found; and (ii) require that Verizon specifically divest either its AWS spectrum and/or its 700 MHz spectrum in a given market.¹⁴

Commission to attach to the certificate 'such terms and conditions as in its judgment the public convenience and necessity may require.'

 $^{^7}$ Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations, FCC 04-255 \P 252 (2004) ("Cingular-AT&T Wireless Order").

⁹ Applications of AT&T Inc. and Dobson Communications Corporation, Memorandum Opinion and Order, 22 FCC Rcd 20295, ¶ 113 (2007) (emphasis added).

¹⁰ Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation, Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 12463, ¶ 113 (2008).

¹¹ Verizon acquired a single AWS license in CMA504 in the ALLTEL transaction.

¹² Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC, Memorandum Opinion and Order and Declaratory Ruling, FCC 08-258, ¶ 159 (2008)("Verizon-ALLTEL Order").

¹³ See, e.g., ULS File No. 0003841868 (transferring AWS license WQMC323, covering CMA181 from Verizon to an AT&T subsidiary as part of the Commission's ordered market divestitures).

¹⁴ See Verizon-ALLTEL Order ¶ 159.

The Commission Has Ample Authority to Formalize Voluntary Conditions in Any Order Granting the Transactions

The Commission has the authority to formalize, as voluntary conditions to the Transactions, the spectrum divestitures already offered by Verizon. Verizon has stated that it if receives a grant of the Transactions then it will not need its unused 700 MHz A and B Block spectrum. The Commission must condition the Transactions upon a commitment from Verizon to divest such spectrum, along with the divestiture of additional AWS spectrum in various markets. Without such a commitment, Verizon could easily decide post-Transactions to pull back from its offer – which would allow Verizon to maintain huge swathes of spectrum in its warehouse – spectrum that it already has stated that it does not need. This would not be in the public interest, particularly when many competitive carriers are starved for additional spectrum that is necessary in order to provide competitive services to customers.

The Commission has often accepted voluntary conditions offered by parties in the context of transaction-reviews. For instance, the Commission noted in its grant of the Comcast/NBC Universal transaction that "[b]ecause of . . . threats posed by the proposed transaction to competition, innovation, and consumer welfare, the Commission has developed a number of targeted, transaction-related conditions and Comcast has offered a number of voluntary commitments to mitigate the potential harms the proposed combination might otherwise cause." ¹⁵ Moreover, the Commission noted that "[o]ur conclusion [to grant the applications] is reinforced by several factors [including that] Applicants have made a number of specific voluntary commitments that will promote the public interest goals of the Act. . . . "16 In addition, in the LightSquared ATC Order, the Commission accepted a number of voluntary commitments from LightSquared in its grant of LightSquared's request. The Commission found "the totality of the facts and circumstances surrounding LightSquared's proposal, including the specific commitments it makes in its filing and several unique circumstances of LightSquared's activities in the MSS L-band, to be consistent with the public interest and the purpose of the MSS/ATC gating criteria." ¹⁷ Thus, the Commission accepted LightSquared's voluntary commitments in the context of its grant of the LightSquared request as a whole. In addition to the spectrum divestitures described above, in the instant situation, the Commission can and should accept Verizon's offer to sell its 700 MHz A and B Block spectrum as part of its grant of the Transactions as whole in order to mitigate the spectrum aggregation and consolidation concerns and resulting anticompetitive harm caused by the proposed Transactions.

Further, RCA urged the Commission to ensure that devices are interoperable within the each of the LTE ecosystems involved in these Transactions. In connection with the divestiture of Verizon's 700 MHz A and B Block spectrum, RCA noted that the Commission must require that any purchaser of this divested spectrum acts to ensure interoperability across the Lower 700 MHz Band. As the Commission is well aware, many Lower A Block licensees are unable to use their spectrum due to the Lower B and C Block-specific band class created and utilized by AT&T (Band Class 17). RCA believes that the Commission can begin to resolve this issue by requiring that any party acquiring Verizon's divested 700

¹⁵ Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign License and Transfer Control of Licensees, Memorandum Order and Opinion, FCC 11-4, ¶ 4 (2011) ("Comcast-NBCU Order").

¹⁶ Id. at ¶ 257.

¹⁷ In the Matter of LightSquared Subsidiary LLC Request for Modification of its Authority for an Ancillary Terrestrial Component, Order and Authorization, DA 11-133, ¶ 35 (2011) ("LightSquared ATC Order").

MHz A or B Block spectrum commit to using only Band Class 12 chipsets in their handsets. As RCA has explained, the Commission has broad legal authority to impose an interoperability mandate. Without an interoperability condition on the divested Lower 700 MHz spectrum, Lower 700 MHz spectrum will not be usable for broadband deployment, rendering any divestiture condition effectively meaningless. Therefore, in order to mitigate the specific competitive harm arising from spectrum aggregation concerns associated with the Transactions, RCA believes that an interoperability condition is required to ensure that usable spectrum is divested into the hands of those operating entities that need it the most in order to provide competitive services to consumers.

Had Verizon worked to construct LTE service in the Lower 700 MHz A and B Blocks simultaneously with its Upper 700 MHz C Block construction, which currently spans over 300 markets, rather than warehouse and now potentially divest the licenses, an interoperable equipment ecosystem in the Lower 700 MHz Band would have developed. Instead of focusing on constructing all 700 MHz licenses, which were acquired through the same auction process, Verizon's warehousing of the Lower 700 MHz A and B Block licenses withheld the economies of scale that would have incented the industry to develop and offer economically-feasible solutions to deploy interoperable Lower 700 MHz LTE networks. Verizon now stands to unload this warehoused spectrum and potentially profit from spectrum management decisions that prohibited deployment by competitors. This is not in the public interest.

Moreover, the Commission must ensure that the circumstances that allowed the A Block to be stranded do not occur again. If these Transactions are granted as proposed, Verizon will control nearly 80% of nationwide holdings in the AWS B and F Blocks, two of only three blocks with a 20 MHz bandwidth. Further, over 95% of Verizon's AWS holdings will be concentrated in these two blocks. The Commission must take action to ensure that Verizon does not abuse its near-monopoly power with respect to these bands to create a chipset that is limited only to the AWS bands used by Verizon. Thus, the Commission must adopt as a condition to these Transactions a commitment that Verizon will not act to create a chipset specific to these two bands, to the exclusion of other entities, and commit to interoperability in the AWS-1 Band.

Lastly, Doug Minster noted that spectrum consolidation in the hands of entities without a near-term need will negatively impact competition and consumers in rural markets. Only with additional spectrum will entities such as Allied Wireless Communication Corporation, an ATN subsidiary, be able to create a pathway to 4G and provide competitive alternatives to rural consumers. ATN stressed that spectrum consolidation is just as dangerous to competition as is the consolidation of competing mobile networks, and should be carefully scrutinized. In this situation, ATN believes that spectrum divestitures – and in particular, AWS spectrum that can be used to deploy LTE services in rural areas in the near-term – are an effective and appropriate remedy for certain markets. These divestitures may stem the near-term spectrum needs of rural carriers that are currently not being met by secondary markets or by future auctions that are on an uncertain timeframe.

Any questions regarding this notice should be directed to the undersigned.

¹⁸ 47 U.S.C. §§ 303(b), 303(g), 303(r), 316.

Sincerely,

/s/ Michael Lazarus

Michael Lazarus of TELECOMMUNICATIONS LAW PROFESSIONALS PLLC

cc (via email): Paul Murray Louis Peraertz

Louis Peraertz Charles Mathias